Supreme Court, U.S.
FILED
99 319 AUG 23 1999
OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

MINGTAI FIRE & MARINE INSURANCE CO., LTD.,

Petitioner,

vs.

UNITED PARCEL SERVICE, INC. and
UNITED PARCEL SERVICE INTERNATIONAL, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL W. LODWICK
Counsel of Record
PORTER, GROFF & LODWICK
A LAW CORPORATION
110 Pine Avenue, 11th Floor
Long Beach, California 90802-4430
(562) 495-1200

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

15158P

QUESTIONS PRESENTED FOR REVIEW

The United States and the People's Republic of China are two of the parties to the Warsaw Convention, a multilateral treaty that provides the exclusive remedy for losses during air transportation between contracting states. This case presents a claim for cargo lost during air transit from Taiwan to California. The U.S. recognizes the PRC as China's sole legal government, and acknowledges that Taiwan is part of China. President Clinton has stated publicly that the U.S. has a "one China" policy and does not support Taiwan independence or statehood – a position that mirrors that of the United Nations.

Based on an argument by the United States as amicus curiae, the court of appeals held that the U.S. treats Taiwan as independent of China. The amicus argued that the U.S. does not recognize in China a right to bind Taiwan to its international treaty commitments. As authority for its two-Chinas argument, the amicus cited the Taiwan Relations Act, a U.S. domestic statute that provides for "unofficial relations with the people on Taiwan."

1. **Separation of powers.** Did the court of appeals infringe the Constitution's separation of powers when it held that the Taiwan Relations Act, rather than the president, determines U.S. foreign policy?

2. **Political-question doctrine.** Did the court of appeals violate this Court's political-question doctrine – or traverse the Constitution's delegation to the president of exclusive authority to recognize foreign sovereigns – by deciding the China question in contravention of the president's determination of that question? Was the amicus position entitled to greater

QUESTIONS PRESENTED FOR REVIEW – Continued

deference than the president's own foreign-policy pronouncements?

3. **Act-of-state doctrine.** Did the court of appeals violate this Court's act-of-state doctrine when it held that the PRC's accession to the Warsaw Convention was not binding on Taiwan?

4. **Treaty of the United States.** Did the court err in refusing to enforce the Warsaw Convention, a treaty to which the U.S. and China both subscribe?

LIST OF ALL PARTIES

Petitioner Mingtai Fire & Marine Insurance Co., Ltd. is a corporation organized under the laws of the Republic of China. Its principal place of business is in Taipei, Taiwan, ROC. Its shares are not publicly traded in the United States.

Respondent United Parcel Service, Inc. is a corporation organized under the laws of the State of Ohio, with its principal place of business in the State of Georgia. Though UPS may be planning to make an initial public offering, it currently is a closely-held corporation and has no parent company, subsidiary, or affiliate that has issued shares to the public.

Respondent United Parcel Service International, Inc. is a corporation organized under the laws of the State of Delaware with its principal place of business in the State of Georgia. It is closely held, and currently has no parent company, subsidiary, or affiliate that has issued shares to the public.

In the court of appeals, the United States of America appeared as an amicus curiae.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF ALL PARTIES iii

TABLE OF CITED AUTHORITIES viii

CITATIONS OF OPINIONS AND ORDERS 1

JURISDICTION 1

STATUTES INVOLVED

U.S. CONST. art. II, § 1 1

U.S. CONST. art. II, § 2, cl. 2 1

U.S. CONST. art. II, § 3 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 8

1. The decision is constitutionally infirm because it contradicts the president's decision of a foreign-policy question and thus contravenes the separation of powers 9

2. The court erred in holding that Congress has recognized Taiwan as a state independent of China 12

3. The decision contravenes the president's one-China policy and overlooks the president's refusal to support Taiwan independence and statehood 16

4. The decision contradicts China's understanding of its agreements with the U.S. 23

TABLE OF CONTENTS – Continued

Page

5. The decision deprives Taiwan of the benefits of the Warsaw Convention's international air regime 27

6. Summary of reasons for granting the petition 29

   a. Constitutional and legal reasons 29

   b. Pragmatic reasons 29

APPENDICES

A. Opinion of the United States Court of Appeals for the Ninth Circuit, filed May 25, 1999..... App. 1

B. Order Granting Defendants' Motion for Summary Judgment and Denying in Part and Granting in Part Plaintiff's Counter-Motion for Summary Judgment, filed December 12, 1997.....App. 11

C. Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. 876, arts. 1 through 41 (1934), *reprinted in* note following 49 U.S.C. § 40105, arts. 1 through 41 (the "Warsaw Convention").....App. 23

D. The Taiwan Relations Act, 22 U.S.C. §§ 3301-3316.....App. 50

E. Department of State File # 399.72/7-359 (September 17, 1959).....App. 73

F. Resolution 2758 (XXVI) of the United Nations General Assembly: Restoration of the Lawful Rights of the People's Republic of China in the United Nations.....App. 75

TABLE OF CONTENTS – Continued

Page

G. The Joint U.S.-China Communiqué, Shanghai, February 27, 1972.....App. 76

H. Diplomatic Relations Between the United States and the People's Republic of China, Address to the Nations; Joint Communiqué on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China (Jan. 1, 1979)..... App. 83

I. Diplomatic Relations Between the United States and the People's Republic of China, United States Statement (Dec. 15, 1978)..... App. 88

J. Excerpts from the President's News Conference with President Jiang, 33 WEEKLY COMP. PRES. DOC. 1657, 1673, 1678 (Oct. 29, 1997).....App. 90

K. Excerpts from Secretary of State Madeleine K. Albright, Press Conference, Beijing Int'l Club Hotel, Beijing, China (Apr. 30, 1998).....App. 92

L. Excerpts from Remarks in a Roundtable Discussion on Shaping China for the 21st Century, 34 WEEKLY COMP. PRES. DOC. 1243, 1267, 1272 (June 30, 1998)....App. 94

M. Excerpts from Secretary of State Madeleine K. Albright, Interview on CNN's "Larry King Live" with Larry King (July 6, 1998)..... App. 95

N. Excerpts from President's News Conference, 35 WEEKLY COMP. PRES. DOC. 1438, 1440 (July 21, 1999)..... App. 96

O. Excerpts from Secretary of State Madeleine K. Albright, Press Conference, Four Seasons Hotel, Singapore (July 25, 1999)..... App. 100

TABLE OF CONTENTS – Continued

Page

P. Note from The Embassy of the People's Republic of China to the Department of State of the United States of America, Washington, D.C., October 16, 1998. . . .App. 101

Q. Excerpts from Background Notes: Taiwan, October 1998, released by the Bureau of East Asian and Pacific Affairs, U.S. Department of State. . . . App. 104

TABLE OF CITED AUTHORITIES

Page

Reported Cases

Atlantic Mut. Ins. Co. v. Northwest Airlines, Inc., 796 F. Supp. 1188 (E.D. Wis. 1992), *aff'd*, 24 F.3d 958 (7th Cir. 1994) 5, 27

Baker v. Carr, 369 U.S. 186 (1962) 6, 11, 23

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 10, 20

Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989) 4

El Al Israel Airlines, Ltd. v. Tsui Yuan Teng, 525 U.S. 155, 119 S. Ct. 662 (1999) 22, 27

Foster v. Neilson, 2 Pet. (27 U.S.) 253 (1829), *overruled on other grounds in United States v. Percheman*, 7 Pet. (32 U.S.) 51 (1833) 10

Goldwater v. Carter, 444 U.S. 996 (1979) 13

Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.) (en banc), *vacated*, 444 U.S. 996 (1979) 13

Jones v. United States, 137 U.S. 202 (1890) 6

Kennett v. Chambers, 14 How. (55 U.S.) 38 (1852) 10

Mingtai Fire & Marine Ins. Co. v. United Parcel Service, 177 F.3d 1142 (9th Cir. 1999) 7, 12, 14, 15, 21

New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc., 954 F.2d 847 (2d Cir.), *cert. denied*, 506 U.S. 827 (1992) 12

Read-Rite Corp. v. Burlington Air Express, Ltd., No. 98-16962 (9th Cir. Aug. 12, 1999), slip op. 3

Schwinn Bicycle Co. v. AFS Cycle & Co., In re, 190 B.R. 599 (Bankr. N.D. Ill. 1995) 5

TABLE OF CITED AUTHORITIES – Continued

Page

Taiwan v. United States Dist. Court, 128 F.3d 712 (9th Cir. 1997) 5

United States v. Belmont, 301 U.S. 324 (1937) 11, 25

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 10, 13, 21

United States v. Palmer, 3 Wheat. (16 U.S.) 610 (1818) 10

United States v. Pink, 315 U.S. 203 (1942) 10, 13, 21

W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400 (1990) 6

UNREPORTED CASES

Eagle Star President General Ins. Co. v. EVA Airways Corp., Case No. 98K2258 (Cal. Mun. Ct.) 27

First Ins. Co. v. China Airlines, Inc., No. CV-97-3731 JSL (RNBx) (C.D. Cal. 1997) 27

CONSTITUTION

U.S. CONST. art. II, § 1 ..... 1, 9

U.S. CONST. art. II, § 2, cl. 2 1

U.S. CONST. art. II, § 3 ..... 1, 7, 9, 13, 21

TREATIES

Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 ("Chicago Convention"), art. 93 bis 28

TABLE OF CITED AUTHORITIES – Continued

Page

Convention for the Unification of Certain Rules Relating to International Transportation by Air Signed at Warsaw on the 12th of October 1929, 49 Stat. 3000, T.S. 876, 137 L.N.T.S. 11, reprinted in note following 49 U.S.C. § 40105 (1994) ("Warsaw Convention") 2, 8

Mutual Defense Treaty (Dec. 2, 1954), U.S.-ROC, T.I.A.S. No. 3178 (terminated 1979) 13

Warsaw Convention art. 1 ..... 1, 2

Warsaw Convention art. 4 4

Warsaw Convention art. 22 4

STATUTES

22 U.S.C. §§ 3301-3316 (1994) 1, 12

22 U.S.C. § 3301(a) 13

22 U.S.C. § 3303(a) 12

22 U.S.C. § 3303(b)(1) 12

22 U.S.C. § 3303(c) 12

22 U.S.C. § 3309 5

28 U.S.C. § 1254(1) (1994) 1

28 U.S.C. § 1331 (1994) 2

28 U.S.C. §§ 1602-1611 (1994) 5

49 U.S.C. App. § 41713(b)(3) (1997) 3

Federal Aviation Administration Authorization Act, 49 U.S.C. App. § 41713(b)(3) (1997) 3

TABLE OF CITED AUTHORITIES – Continued

Page

Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1994) 5

Taiwan Relations Act, 22 U.S.C. §§ 3301-3316 (1994) 5

EXECUTIVE-BRANCH DOCUMENTS

Background Notes: Taiwan, October 1998 (Bureau of East Asian and Pacific Affairs, U.S. Dep't of State) (visited Aug. 4, 1999) <http://www.usconsulate.org.hk/ustw/98bg.htm> 16, 17

Diplomatic Relations Between the United States and the People's Republic of China, Address to the Nation (Dec. 15, 1978), *reprinted in* 1978 PUB. PAPERS: JIMMY CARTER 2265 ..... 14, 20

Diplomatic Relations Between the United States and the People's Republic of China, United States Statement (Dec. 15, 1978), *reprinted in* 1978 PUB. PAPERS: JIMMY CARTER 2266 ..... 3, 4, 20

Joint Communiqué on the Establishment of Diplomatic Relations Between the United States and the People's Republic of China (Jan. 1, 1979), *reprinted in* 1978 PUB. PAPERS: JIMMY CARTER 2264 ..... 3, 4, 20, 26

Joint U.S.-China Communiqué, Shanghai (Feb. 27, 1972) (visited Aug. 16, 1999) <www.ait.org.tw/shanghai.html> (hereinafter "Shanghai Communiqué") 15, 26

Note from U.S. Dep't of State to Ambassador of Polish People's Republic, Washington, D.C. (Sept. 17, 1959) (U.S. Dep't of State File # 399.72/7-359) ..3, 24

President's News Conference with President Jiang, 33 WEEKLY COMP. PRES. DOC. 1657 (Oct. 29, 1997) 16

TABLE OF CITED AUTHORITIES – Continued

Page

President's News Conference, 35 WEEKLY COMP. PRES. DOC. 1438 (July 21, 1999) 7

Remarks in a Roundtable Discussion on Shaping China for the 21st Century, 34 WEEKLY COMP. PRES. DOC. 1243 (June 30, 1998) 7, 16, 20

Secretary of State Madeleine K. Albright, Interview on CNN's "Larry King Live" with Larry King (July 6, 1998) (visited Oct. 16, 1998) <http://secretary.state.gov/www/statements/1998/980706.html> 17

Secretary of State Madeleine K. Albright, Press Conference, Beijing Int'l Club Hotel, Beijing, China (Apr. 30, 1998) (visited July 29, 1999) <http://secretary.state.gov/www/statements/1998/980430b.html> 17

Secretary of State Madeleine K. Albright, Press Conference, Four Seasons Hotel, Singapore (July 25, 1999) (visited July 26, 1999) <http://secretary.state.gov/www.statements/1999/990725.html> 19

LEGISLATIVE MATERIALS AND REPORTS

10 ANNALS OF CONGRESS (1800) 10

1 S. REP. NO. 96-7, 96th Cong., 1st Sess. (1979), reprinted in 1979 U.S.C.C.A.N. 36 13

Robert Sutter, *The "Three No's," Congressional-Administration Differences, and U.S. Policy Issues, CRS Report for Congress* (Library of Congress: Congressional Research Service, Oct. 1, 1998) 19, 20

TABLE OF CITED AUTHORITIES – Continued

Page

Chinese Materials

Note from Embassy of People's Republic of China to U.S. Dep't of State, No. CE 087/98 (Oct. 16, 1998) 8, 23, 24, 25, 26

President Lee Teng-hui, Responses to Questions Submitted by Deutsche Welle (Voice of Germany) (July 9, 1999) (visited August 17, 1999) <http://www.gio.gov.tw/info/99html/991ee/07009.htm> 19

United Nations Materials

United Nations General Assembly Resolution 2758 (XXVI), UN. GAOR (Oct. 25, 1971), 26th Sess., Supp. No. 29, U.N. Doc. A/8429 6

Vienna Convention on the Law of Treaties, art. 21(3), U.N. Doc. A/CONF. 39/27 (1969), *reprinted in* 63 Am. J. Int'l L. 875 (1969) 25

Secondary Sources

Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 Am. J. Int'l L. 805 (1989) 22

John W. Garver, Face Off: China, the United States, and Taiwan's Democratization (1997) 18

4 John Bassett Moore, A Digest of International Law, as Embodied in Diplomatic Discussions, Treaties and Other International Agreements, International Awards, the Decisions of Municipal Courts, and the Writings of Jurists (U.S. Gov't Printing Office 1906) 9, 10

TABLE OF CITED AUTHORITIES – Continued

Page

JAMES MANN, ABOUT FACE: A HISTORY OF AMERICA'S CURIOUS RELATIONSHIP WITH CHINA, FROM NIXON TO CLINTON (1999) 13, 18, 20, 21, 25

1 Peter Martin, J.D. McLean, Elizabeth de Montlaur Martin, Rod Margo & J.M. Balfour, SHAWCROSS & BEAUMONT, AIR LAW (1999 Supp.) 6, 28

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW (1987) 13, 25

John R. Schmertz, Note on *Mingtai Fire & Marine Ins. Co. v. United Parcel Service*, 5 INT'L L. UPDATE 62 (June 1999) 28

MALCOLM N. SHAW, INTERNATIONAL LAW (2d ed. 1986) 14

2 SHAWCROSS & BEAUMONT, AIR LAW (ed. by Peter Martin & Elizabeth de Montlaur Martin) (1999 supp.) 3, 4, 25

CITATIONS OF OPINIONS AND ORDERS

The opinion of the court of appeals (Pet. App. 1-10) is reported at 177 F.3d 1142. Although designated "For Publication," the opinion of the district court (Pet. App. 11-22) is not reported.

JURISDICTION

The court of appeals entered judgment (Pet. App. 10) on May 25, 1999. This petition for a writ of certiorari was filed on August 23, 1999. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves a treaty of the United States, the Warsaw Convention, 49 U.S.C. § 40105 note (Pet. App. 23-49); a domestic statute, the Taiwan Relations Act, 22 U.S.C. §§ 3301-3316 (Pet. App. 50-72), and the following clauses of the Constitution:

U.S. CONST. art. II, § 1:

The executive Power shall be vested in a President of the United States of America. . . .

U.S. CONST. art. II, § 2, cl. 2:

He shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their

Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws are faithfully executed, and shall Commission all the Officers of the United States.

STATEMENT OF THE CASE

Petitioner Mingtai Fire & Marine Insurance Co., Ltd. is a Taiwanese insurance company. It insured a shipment of CPU Pentium-90 computer equipment, made in Taiwan and sold to a U.S. buyer, against the risks of loss and damage during air transportation from Taipei, Taiwan to San Jose, California. Respondents accepted the goods for shipment but never delivered them. Mingtai paid the loss ($83,454.80) and brought this action to recover indemnity from respondents.

Mingtai stated its claim under the Warsaw Convention[1] – an international treaty that provides the exclusive remedy for cargo losses during international air transportation if both the place of departure and the place of destination are within the territory of a state that ratified or acceded to the Convention (termed a "High Contracting Party"[2]). Jurisdiction in the district court was based on 28 U.S.C. § 1331. Mingtai contended the claim arose under a treaty of the United States. The district court refused to apply the Convention, but found an alternative basis for jurisdiction under the Federal Aviation

---

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air Signed at Warsaw on the 12th of October 1929, 49 Stat. 3000, T.S. 876, codified in note following 49 U.S.C. § 40105 (hereinafter "Warsaw Convention") (Pet. App. 23-49).

[2] *Id.*, arts. 1, 18 (Pet. App. 24-25, 34-35).

Administration Authorization Act ("FAAAA").[3] Recently, the Ninth Circuit has held that the district courts have jurisdiction of air claims under federal common law when the Warsaw Convention does not apply.[4]

The U.S. ratified the Convention on July 31, 1934, and it entered into force in this country on October 29, 1934.[5] On July 20, 1958, the People's Republic of China (PRC) acceded to the Convention for "the entire Chinese territory including Taiwan."[6] It entered into force in China on October 18, 1958.[7] In 1959 the U.S. regarded this accession "as being without legal effect" because it recognized the Republic of China (ROC) "as the only legal Government of China and [did] not recognize the so-called 'People's Republic of China'. . . ."[8]

Twenty years later, President Carter reversed this position. Announcing the Joint Communiqué on the Establishment of Diplomatic Relations,[9] he formally recognized the PRC as the sole legal government of China and withdrew recognition from the ROC.[10] The president also "acknowledge[d] the

---

[3] Federal Aviation Administration Authorization Act, 49 U.S.C. § 41713(b)(3) (1997).

[4] Read-Rite Corp. v. Burlington Air Express, Ltd., No. 98-16962 (9th Cir. Aug. 12, 1999), slip op. at 9076-82.

[5] 2 SHAWCROSS & BEAUMONT, AIR LAW A 21 (ed. by Peter Martin & Elizabeth de Montlaur Martin) (1999 Supp.) (hereinafter "2 SHAWCROSS & BEAUMONT").

[6] *Id.* at A 17, A 22 n.8.

[7] *Id.* at A 17.

[8] Note from U.S. Dep't of State to Ambassador of Polish People's Republic, Washington, D.C. (Sept. 17, 1959) (U.S. Dep't of State File # 399.72/7-359) (hereinafter cited by the file number) at 3 (Pet. App. 73-74).

[9] Joint Communiqué on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China (Jan. 1, 1979) (hereinafter "Joint Communiqué"), *reprinted in* 1978 PUB. PAPERS: 2 JIMMY CARTER at 2264-65 (Pet. App. 83-87).

[10] Diplomatic Relations Between the United States and the People's Republic of China, United States Statement (Dec. 15, 1978) (hereinafter

Chinese position that there is but one China and Taiwan is part of China."[11] Mingtai (and almost everyone concerned with air transportation between the U.S. and Taiwan) believed the U.S. had unquestionably accepted the legal effect of China's accession to the Warsaw Convention for "the entire Chinese territory including Taiwan."[12] The only reported decision of the issue by an Article III court held that this was so.[13]

But respondent United Parcel Service (UPS) had other ideas. As the exclusive remedy for losses during air transportation, the Warsaw Convention prescribes a minimum limitation of liability[14] – customarily converted into U.S. currency as $20 per kilogram of the weight of goods lost or damaged.[15] This posed a problem for UPS because its air waybill imposed a limitation of just $100 per shipment, regardless of weight.[16] Additionally troublesome for UPS was the fact that the Convention requires the air carrier to issue a waybill containing specific items, absent which the carrier forfeits the right to limit liability.[17] In this case, Mingtai's claim to the full value of the lost cargo was based, inter alia, on an omission from the air waybill which would have deprived UPS of the $20-

---

"U.S. Statement"), *reprinted in* 1978 PUB. PAPERS: 2 JIMMY CARTER at 2266 (Pet. App. 88-89).

[11] Joint Communiqué, *supra* note 9, 1978 PUB. PAPERS: 2 JIMMY CARTER at 2264 (Pet. App. 84).

[12] 2 SHAWCROSS & BEAUMONT, *supra* note 5, at A 17, A 23 n.8.

[13] Atlantic Mut. Ins. Co. v. Northwest Airlines, Inc., 796 F. Supp. 1188, 1191 (E.D. Wis. 1992), *aff'd*, 24 F.3d 958 (7th Cir. 1994).

[14] Warsaw Convention, *supra* note 1, art. 22 (Pet. App. 36-37).

[15] *Id.*

[16] Order Granting Defendants' Motion for Summary Judgment and Denying in Part and Granting in Part Plaintiff's Counter-Motion for Summary Judgment, filed Dec. 12, 1997 (hereinafter "District Court Order") at 10-11 (Pet. App. 22).

[17] Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 131-34 & 131 n.4. (1989) (failure to comply with art. 4 requirements for baggage checks).

per-kilo limitation. Faced with these deficiencies, UPS could limit liability only by convincing the district court to throw out the Warsaw Convention. This would leave UPS unfettered by the treaty's prohibition of its contractual $100-per-shipment limitation. UPS accomplished this result by convincing the district court not to follow the one reported Article III case on point,[18] but to rely on a bankruptcy judge's view that the Warsaw Convention does not apply to Taiwan because it is not part of China.[19]

The district court also relied on a Ninth Circuit ruling that Taiwan is a "foreign state" within the meaning of the Foreign Sovereign Immunities Act (FSIA).[20] In that case, the court issued a writ of mandamus to quash a subpoena served on an employee of the Taipei Economic Representative and Cultural Office – the "Taiwan instrumentality" in the Taiwan Relations Act.[21] "Although the United States does not maintain diplomatic relations with Taiwan," said the court, "Taiwan is a 'foreign state,' within the meaning of the FSIA."[22]

In this case, the court of appeals affirmed the district court's ruling that Warsaw does not apply to flights to or from Taiwan, and that UPS could limit its liability to $100. Both courts thus refused to enforce a treaty that embodies both U.S. law and international law. The Warsaw Convention is administered by the International Civil Aviation Organisation (ICAO), the United Nations specialized agency responsible

---

[18] Atlantic Mutual, 796 F. Supp. 1188.

[19] District Court Order, *supra* note 16, at 4, 6-7 (Pet. App. 15, 17-18) (citing In re Schwinn Bicycle Co. v. AFS Cycle & Co., 190 B.R. 599 (Bankr. N.D. Ill. 1995)).

[20] Taiwan v. United States Dist. Court, 128 F.3d 712, 715 (9th Cir. 1997).

[21] Taiwan Relations Act, 22 U.S.C. §§ 3301-3316, at § 3309 (1994) (Pet. App. 64-65).

[22] Taiwan, 128 F.3d at 715 (citing the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1994)).

for air treaties.[23] Since the U.S. accepts the U.N.'s determination that the PRC speaks for all China, including Taiwan,[24] the courts of this country should enforce the Convention between the U.S. and Taiwan.

Besides contradicting the U.N. position on China, the result below contravenes this Court's act-of-state doctrine, which prohibits judicial review of a foreign sovereign's act within its own territory.[25] To avoid a fatal collision with this entrenched federal principle, the district court concluded that Taiwan was a separate foreign state.[26] While saying it could not decide the political question of whether China's accession to the Convention was effective for Taiwan, it effectively decided the question.[27]

Derived from the constitutional separation of powers, the political-question doctrine prohibits the judiciary from reviewing political decisions made by the political branches.[28] Under this doctrine, the courts below had no power to determine whether Taiwan was within or beyond China's boundaries. As this Court has written,

> Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive branches of any government conclusively binds the judges, as well as all other officers,

---

[23] 1 Peter Martin, J.D. McLean, Elizabeth de Montlaur Martin, Rod Margo & J.M. Balfour, SHAWCROSS & BEAUMONT, AIR LAW § II(15) (1999 Supp.) (hereinafter "1 SHAWCROSS & BEAUMONT").

[24] G.A. Res. 2758 (XXVI), U.N. GAOR (Oct. 25, 1971), 26th Sess., Supp. No. 29, U.N. Doc. A/8429 (Pet. App. 75).

[25] W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 405 (1990).

[26] District Court Order, *supra* note 16, at 5-6 (Pet. App. 16-17).

[27] *Id.*

[28] Baker v. Carr, 369 U.S. 186, 211-13, 217 (1962).

> citizens, and subjects of that government. This principle has always been upheld by this court. . . .[29]

The court of appeals, in turn, did not address the act-of-state doctrine;[30] it focused solely on the political nature of the question before it.[31] Though it discerned, correctly, that whether Taiwan is part of China is a political question that should not be decided by the courts, it concluded, incorrectly, that the U.S. does not recognize China's claim to Taiwan. Finding that the U.S. regards Taiwan as separate, the court of appeals held that China's accession to the Warsaw Convention does not apply to Taiwan.[32]

The court reached this result without addressing the president's foreign-policy pronouncements. In an October 1997 news conference with China's President Jiang Zemin, President Clinton emphasized his one-China policy.[33] In June 1998, he stated unequivocally that the U.S. does not support Taiwan independence or statehood.[34] The Constitution's separation of powers[35] required the court of appeals to accord the president's one-China policy the greatest deference. But the court's opinion does not mention the foreign policy of the one person empowered by the Constitution to determine that policy. Instead, it focuses solely on the policy position argued by the amicus – which directly contradicts the president's view.

The Department of Justice filed an amicus brief in the court of appeals, and argued that Taiwan could not be bound

---

[29] Jones v. United States, 137 U.S. 202, 212 (1890).

[30] Mingtai Fire & Marine Ins. Co. v. United Parcel Service, 177 F.3d 1142, 1144-47 (9th Cir. 1999) (Pet. App. 3-9).

[31] *Id.*

[32] *Id.* at 1147.

[33] President's News Conference with President Jiang, 33 WEEKLY COMP. PRES. DOC. 1657, 1673, 1678 (Oct. 29, 1997) (Pet. App. 90-91).

[34] Remarks in a Roundtable Discussion on Shaping China for the 21st Century, 34 WEEKLY COMP. PRES. DOC. 1243, 1267, 1272 (June 30, 1998) (Pet. App. 94).

[35] U.S. CONST. art. II, § 3 (Pet. 2).

by China's accession to the Warsaw Convention.[36] The amicus plumped, in effect, for a "two-Chinas policy." In deciding this issue, the court of appeals accorded the amicus complete deference. The court failed to discuss the president's China policy, and adopted contrary representations by the president's subordinates in the Executive branch. By declining to defer to the president's view, the court decided a political question contrary to the president's determination of that question.

REASONS FOR GRANTING THE PETITION

Petitioner, a Taiwanese insurance company, asks this Court to reverse the court of appeals because it refused to enforce the Warsaw Convention[37] – a treaty between the U.S. and many nations, including China. The constitutional and legal reasons for granting relief have been suggested above and will be developed below. But there are additional, pragmatic reasons why the decision should not be allowed to stand.

First, the decision threatens friction with China. The amicus argument drew sharp criticism from the Chinese embassy in Washington. In a note protesting the amicus brief – sent to the U.S. Department of State while the appeal was pending – China challenged the view that its accession to the Warsaw Convention does not bind Taiwan, and claimed that this view breached U.S. diplomatic commitments and international law.[38]

Second, the decision will harm Taiwan's economy. The ruling created a furor on Taiwan, where it is felt that denying the Convention's application to air commerce between Taiwan

---

[36] Brief for the United States as Amicus Curiae, Docket No. 98-15088 (9th Cir. 1998) (hereinafter "Amicus Brief") at 1-2.

[37] Warsaw Convention, *supra* note 1.

[38] Note from Embassy of the People's Republic of China to U.S. Dep't of State, No. CE 087/98 (Oct. 16, 1998) (hereinafter "Chinese Embassy Note") at 1 (Pet. App. at 101-03).

and the U.S. will harm Taiwan's commercial intercourse and weaken its economy. In response, the ROC's Ministry of Foreign Affairs encouraged Mingtai to file this petition. Although Taiwan's business community and the Ministry view this as an economic (not a political) question, they share China's view that the Convention applies to Taiwan.

1. The decision is constitutionally infirm because it contradicts the president's decision of a foreign-policy question and thus contravenes the separation of powers.

The court of appeals' decision is constitutionally infirm because it contradicts the president's one-China policy, and thereby decides a political question – more particularly, a foreign-policy question – in a manner contrary to the president's determination of that question.

The Constitution is a laconic instrument, and its brevity is seldom more evident than on the political question raised by this petition. Of the power to recognize foreign states, the Constitution says only that "[t]he executive Power shall be vested in a President of the United States of America,"[39] and the President "shall receive Ambassadors and other public Ministers. . . ."[40] It is well-settled that the power to receive includes the power to refuse[41] – and hence the power to recognize, which is at the core of this case.

---

[39] U.S. CONST. art. I, § 1 (Pet. 1).

[40] *Id.* art. II, § 3 (Pet. 2).

[41] 4 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW, AS EMBODIED IN DIPLOMATIC DISCUSSIONS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS, INTERNATIONAL AWARDS, THE DECISIONS OF MUNICIPAL COURTS, AND THE WRITINGS OF JURISTS 473-548 (U.S. Gov't Printing Office 1906) (hereinafter "4 MOORE").

This Court has held that the president is the "sole organ of the federal government in the field of international relations. . . ."[42] This principle – even the very language – derives from the "Marshall doctrine," enunciated by John Marshall in the House of Representatives in 1800, the year before he was appointed Chief Justice of this Court. Responding to attacks on President John Adams for remanding a fugitive to British custody, as the Jay Treaty permitted, the future Chief Justice asserted: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[43] Ten years earlier, Vice-President Thomas Jefferson had refused to credential a consul sent by the French Republic because the consul's commission was addressed to Congress, not the president. Jefferson insisted that "as the President was the only channel of communication between the United States and foreign nations, it was from him alone 'that foreign nations or their agents are to learn what is or has been the will of the nation. . . .'"[44]

This Court has long held that the president's determination whether to recognize a foreign state is conclusive on the courts.[45] So, too, is the president's decision to recognize the *de jure* ruler of a foreign state.[46] In *Baker v. Carr*, this Court, speaking by Justice Brennan, observed that "[t]he nonjusticiability of a political question is primarily a function of

---

[42] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

[43] 10 ANNALS OF CONGRESS 596, 613-14 (1800).

[44] 4 MOORE, *supra* note 41, at 680-81 (quoted material omitted).

[45] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964); United States v. Pink, 315 U.S. 203, 229-30 (1942); Kennett v. Chambers, 14 How. (55 U.S.) 38 (1852) (whether to recognize the Republic of Texas); United States v. Palmer, 3 Wheat. (16 U.S.) 610 (1818).

[46] *See* cases in note 45 *supra*. *See also* Foster v. Neilson, 2 Pet. (27 U.S.) 253, 307 (1829), *overruled on other grounds in* United States v. Percheman, 7 Pet. (32 U.S.) 51, 89 (1833).

the separation of powers."[47] In this instance, as in *Baker*, the Constitution delegates to the president alone the power to recognize China's claim to Taiwan. Although, as Justice Brennan noted, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance,"[48] many questions do lie beyond. These include questions that "involve the exercise of a discretion demonstrably committed to the executive or legislature,"[49] and those that "uniquely demand single-voiced statement of the Government's views."[50]

The question whether the president recognizes a foreign sovereign's claim to a particular territory not only demands a single-voiced statement of U.S. policy; it involves the use of a discretion allotted by the Constitution to the president alone.[51] Thus, presidents from Woodrow Wilson through Herbert Hoover could balk at recognizing the USSR, yet President Franklin Delano Roosevelt could, constitutionally, grant such recognition.[52] Though presidents from Harry S. Truman through Lyndon B. Johnson could refuse to recognize the PRC, Presidents Nixon and Carter could, constitutionally, move to recognize it as China's sole legal government.

Thus, the court erred in adopting the amicus argument for a separate Taiwan when faced with evidence of President Clinton's resolve upon a one-China policy.[53] Whether this decision is viewed as misplaced deference to the wrong

---

[47] 369 U.S. 186, 210 (1962).

[48] *Id.* at 211.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 212.

[52] United States v. Belmont, 301 U.S. 324, 330 (1937).

[53] Public statements about the one-China policy – by President Clinton and Secretary Albright – were quoted in Mingtai's Reply Brief of Appellant at 4-6 (hereinafter "Reply Brief"), and presented again at oral argument. Audio recording of oral argument, Docket No. 98-15088, San Francisco (Mar. 10, 1999) (hereinafter "Oral Argument Tape").

source for U.S. foreign policy or as an unconstitutional determination of foreign policy, the court of appeals should be reversed.

2. The court erred in holding that Congress has recognized Taiwan as a state independent of China.

The court of appeals framed its ruling with the Taiwan Relations Act[54] and annotations drawn from the Department of State's *Treaties in Force*.[55] Citing the Act's provision for continued application of U.S. laws to Taiwan after derecognition, the court inferred: "These provisions, and the Act generally, strongly imply that, despite the absence of official relations, the United States continues to deal separately with Taiwan."[56] But it does not follow that Taiwan is not part of China.

The court emphasized that the Act "gave no indication that existing or future agreements with the newly recognized China would be binding upon Taiwan."[57] Yet the Act would be altogether unnecessary if the U.S. did not concede that Taiwan is part of China. The U.S. could formally recognize the PRC as sovereign on mainland China and the ROC as sovereign on Taiwan.

At oral argument, the court described the Taiwan Relations Act as "controlling federal law"[58] because it implies that Taiwan is separate from China. But the Act is a domestic statute – not a treaty with Taiwan.[59] In fact, the Act was drafted to avoid an official relationship with the ROC precisely because it had its origins in the *de*recognition of the

---

[54] 22 U.S.C. §§ 3301-3316 (Pet. App. 50-72).

[55] Mingtai, 177 F.3d at 1146 (Pet. App. 7-8).

[56] *Id.* (quoting 22 U.S.C. §§ 3303(a), (b)(1), and (c)) (Pet. App. 7).

[57] *Id.* (Pet. App. 7).

[58] Oral Argument Tape, *supra* note 53.

[59] New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc., 954 F.2d 847, 852 (2d Cir.), cert. denied, 506 U.S. 827 (1992).

ROC.[60] Nor can Congress constitutionally recognize a state that the president declines to recognize, or vote that a foreign state may not claim a given territory. The Constitution vests that power in the president,[61] who is – in this Court's words – "the sole organ of the federal government in the field of international relations."[62] As the American Law Institute explains, "The Supreme Court long ago affirmed the binding power of Presidential determinations as to sovereignty over territory."[63]

Taiwan's derecognition was the price of diplomatic relations with China – as President Nixon realized nearly 30 years ago.[64] Said the en-banc D.C. Circuit: "The PRC stipulated that full mutual diplomatic recognition was preconditioned on United States agreement to cease all diplomatic and other official relations with the ROC, to withdraw United States military units from Taiwan, and to terminate the Mutual Defense Treaty with the ROC."[65] This is underscored by Justice Brennan's accurate assessment – in his *Goldwater* dissent[66] – of why recognizing China required termination of the Mutual Defense Treaty:

---

[60] 22 U.S.C. § 3301(a) (Pet. App. 52-54).

[61] U.S. CONST. art. II, § 3 (Pet. 2); United States v. Pink, 315 U.S. at 329.

[62] United States v. Curtiss-Wright, 299 U.S. at 320.

[63] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW (hereinafter "RESTATEMENT") § 204 n.1 (1987).

[64] JAMES MANN, ABOUT FACE: A HISTORY OF AMERICA'S CURIOUS RELATIONSHIP WITH CHINA, FROM NIXON TO CLINTON 46 (1999) (hereinafter "MANN, ABOUT FACE").

[65] Goldwater v. Carter, 617 F.2d 697, 700 (D.C. Cir.) (en banc), *vacated*, 444 U.S. 996 (1979) (citing Mutual Defense Treaty (Dec. 2, 1954), U.S.-ROC, T.I.A.S. No. 3178 (terminated 1979)). *See also* 1 S. REP. No. 96-7, 96th Cong., 1st Sess. at 5 (1979), *reprinted in* 1979 U.S.C.C.A.N. 36, 40.

[66] Goldwater v. Carter, 444 U.S. 996, 1006-07 (1979) (Brennan, J., dissenting).

> Abrogation of the defense treaty with Taiwan was a necessary incident to Executive recognition of the Peking Government, because the defense treaty was predicated upon the now-abandoned view that the Taiwan Government was the only legitimate authority in China.[67]

While withdrawing recognition and terminating the treaty, President Carter proposed the Taiwan Relations Act as a way of enabling the U.S. to recognize China without leaving Taiwan out in the cold:

> I have paid special attention to ensuring that normalization of relations between our country and the People's Republic of China will not jeopardize the well-being of the people of Taiwan. The people of our country will maintain our current, commercial, cultural, trade, and other relations with Taiwan through nongovernmental means. Many other countries in the world are already successfully doing this.[68]

President Carter suggested an *unofficial* relationship between peoples – not an official liaison between states. Thus, the Taiwan Relations Act – which embodies this idea – does not repugn U.S. acknowledgment of China's claim to Taiwan. It treats Taiwan as "a non-state territorial entity which is *de jure* part of China but under separate administration."[69]

Realizing the drawback of reading between the lines of this Act,[70] the court of appeals sought guidance from *Treaties*

---

[67] *Id.* at 1007.

[68] Diplomatic Relations Between the United States and the People's Republic of China, Address to the Nation (Dec. 15, 1978) (hereinafter "Address to Nation"), *reprinted in* 1978 PUB. PAPERS: 2 JIMMY CARTER at 2265 (Pet. App. 86).

[69] MALCOLM N. SHAW, INTERNATIONAL LAW 148-49 (2d ed. 1986).

[70] Mingtai, 177 F.3d at 1146 (Pet. App. 7).

in Force.[71] There, the court found references to bilateral treaties made before derecognition of the ROC as treaties with "China (Taiwan)," and bilateral treaties made after China's recognition as treaties with "China." Since the Warsaw Convention is listed as a treaty with "China," the court inferred it is not applicable to Taiwan.[72] But if, after China's recognition, Taiwan is part of China – as the Shanghai[73] and Joint Communiqués[74] acknowledge – listing Taiwan alongside China would be redundant. And treaties with Taiwan that survived derecognition could not be listed as treaties with "China."

Inferences drawn from the Taiwan Relations Act and the terminology of *Treaties in Force* are slender threads on which to hang a decision that takes the benefits of the Warsaw Convention away from Taiwan and the foreigners (including Americans) who use commercial aircraft to trade or visit there. Deciphering these texts did not yield persuasive evidence, and the court was unwilling to "merely rely upon the implications of the Act and the statements in and structure of *Treaties in Force*. . . ."[75] To resolve the appeal, it turned to "the Executive's express position on the issue presented. In an amicus brief and at oral argument, the United States made plain its position that China's adherence to the Convention does not bind Taiwan."[76]

Thus, the court of appeals reached the result the amicus sought – not by its own construction of the Taiwan Relations Act, but by deferring to the gloss offered by the amicus. With

---

[71] *Id.* (Pet. App. 7-8).

[72] *Id.* (Pet. App. 8).

[73] The Joint U.S.-China Communiqué, Shanghai (Feb. 27, 1972) (visited Aug. 16, 1999) <www.ait.org.tw/shanghai.html> (hereinafter "Shanghai Communiqué") (Pet. App. 76-82).

[74] Joint Communiqué, *supra* note 9, 1978 PUB. PAPERS: 2 JIMMY CARTER at 2264-65 (Pet. App. 83-87).

[75] Mingtai, 177 F.3d at 1146 (Pet. App. 8).

[76] *Id.* (Pet. App. 8).

no evidence other than the Act's language, the court adopted the amicus' conclusory statement that "[t]he United States has not recognized in the PRC a power to bind Taiwan to the PRC's international commitments."[77] As the next section shows, the president's authoritative foreign-policy statements contradict the court's conclusion.

3. The court's ruling contravenes the president's one-China policy and overlooks the president's refusal to support Taiwan independence and statehood.

The judgment that Taiwan is independent of China contradicts President Clinton's express one-China policy. The president has explained his policy thusly: "[W]e don't support independence for Taiwan, or two Chinas, or one China – one Taiwan. And we don't believe that Taiwan should be a member in any organization for which statehood is a requirement."[78] In his joint press conference with China's President Jiang on October 29, 1997, President Clinton linked this one-China policy to continued unofficial relations with Taiwan:

> I think the most important thing the United States can do is to adhere strictly to the one China policy we have agreed on, [and] to make it clear that within the context of that one China policy, as articulated in the [Joint] Communiqué and our own laws, we will maintain friendly, open relations with the people of Taiwan and China. . . .[79]

---

[77] Amicus Brief, *supra* note 36, at 1-2.

[78] Remarks in a Roundtable Discussion on Shaping China for the 21st Century, 34 WEEKLY COMP. PRES. DOC. 1243, 1272 (June 30, 1998) (Pet. App. 94). *Accord* Background Notes: Taiwan, October 1998, released by the Bureau of East Asian and Pacific Affairs, U.S. Dep't of State (visited Aug. 4, 1999) <http://www.usconsulate.org.hk/ustw/98bg.htm> (hereinafter "Dep't of State Background Notes") at 11 (Pet. App. 104).

[79] President's News Conference with President Jiang, 33 WEEKLY COMP. PRES. DOC. 1657, 1673, 1678 (Oct. 29, 1997) (Pet. App. 90).

Even though the U.S. maintains unofficial relations with Taiwan, the president rejects the idea of Taiwan independence. During her visit to China in 1998, Secretary of State Madeleine K. Albright forcefully stated: "[W]e have no change in our China policy. . . . [W]e have a one-China policy – not a "two China," not a "one China and one Taiwan" policy – and we do not support Taiwan independence or their membership in international organizations that are based on statehood."[80]

When President Clinton repeated this formulation in Shanghai two months later,[81] it became known as "the three noes."[82] Said the president: "I had a chance to reiterate our Taiwan policy, which is that we don't support independence for Taiwan, or two Chinas, or one China – one Taiwan. And we don't believe that Taiwan should be a member in any organization for which statehood is a requirement."[83]

Secretary Albright later assured CNN talk-show host Larry King that the president had not misstated U.S. foreign

---

[80] Secretary of State Madeleine K. Albright, Press Conference, Beijing Int'l Club Hotel, Beijing, China (Apr. 30, 1998) (visited July 29, 1999) <http://secretary.state.gov/www/statements/1998/980430b.html> at 5 (Pet. App. 92); *see also* Dep't of State Background Notes, *supra* note 78, at 11 (Pet. App. 104).

[81] Remarks in a Roundtable Discussion on Shaping China for the 21st Century, 34 WEEKLY COMP. PRES. DOC. 1243, 1272 (Oct. 29, 1998) (Pet. App. 94-95).

[82] See, e.g., Robert Sutter, *The "Three No's," Congressional-Administration Differences, and U.S. Policy Issues, CRS Report for Congress* (Library of Congress: Congressional Research Service, Oct. 1, 1998) (hereinafter "Sutter, *'Three No's'* "). *See also* MANN, ABOUT FACE, *supra* note 64, at 366.

[83] Remarks in a Roundtable Discussion on Shaping China for the 21st Century, 34 WEEKLY COMP. PRES. DOC. 1243, 1272 (1998) (Pet. App. 94).

policy: "This has been our standard way of saying it."[84] Although the U.S. has "an unofficial relationship with the Taiwanese," mediated by the Taiwan Relations Act, "our policy has been and continues to be a one-China policy, and we want them to have a peaceful dialogue to resolve this issue."[85] Thus, as the vehicle for unofficial relations with Taiwan, the Taiwan Relations Act operates side-by-side with the U.S. acknowledgment that Taiwan is part of China. The court of appeals averred a conflict where none exists.

In a report to Congress issued after the amicus brief was filed, the Congressional Research Service advised the House and Senate that President Clinton's rejection of Taiwan independence dates from at least 1996,[86] and is rooted in assurances given the Chinese by the Nixon administration:

> This marked the first time a U.S. President had publicly affirmed the "three no's," though Clinton Administration officials have been saying them publicly and in private conversations with Chinese leaders publicized by Chinese media since at least 1996. Earlier U.S. statements, including some made privately by senior Administration officials to Chinese counterparts going as far back as 1971 provide a basis for the current "three no's," according to Clinton Administration officials. In particular, the Administration maintains that the "three no's" are consistent with the one China affirmations contained in the communiques of 1972, 1979, and 1982

---

[84] Secretary of State Madeleine K. Albright, Interview on CNN's "Larry King Live" with Larry King (July 6, 1998) (visited Oct. 16, 1998) <http://secretary.state.gov/www/statements/1998/980706.html> at 3 (Pet. App. 95).

[85] *Id.*

[86] President Clinton set forth the "three noes" in a private letter to President Jiang, which Secretary of State Warren J. Christopher delivered to the Chinese ambassador in Washington in August 1995. MANN, ABOUT FACE, *supra* note 64, at 330; JOHN W. GARVER, FACE OFF: CHINA, THE UNITED STATES, AND TAIWAN'S DEMOCRATIZATION 79-80 (1997).

> that provide the framework for U.S.-PRC relations. Those communiques reflect agreements between the U.S. and PRC in which the U.S. broke off U.S. official ties with Taiwan; acknowledged the position that there is but one China; and agreed to limit U.S. arms sales to Taiwan provided Beijing pursues a peaceful approach toward the island.[87]

This report confirms that President Clinton adheres to a one-China policy and refutes the court's contrary conclusion. This one-China policy remains in force as this petition goes to print. Responding to the stir caused by ROC-President Lee Teng-hui's remarks about Taiwan's negotiating status *vis-à-vis* China,[88] President Clinton repeated the one-China policy in a press conference on July 21, 1999.[89] Four days later, Secretary Albright did the same.[90] The "three noes" comprise U.S. policy on Taiwan. The court of appeals erred by not considering the president's authoritative statements of this policy. It also infringed the separation of powers by adopting the amicus position offered by some of the president's subordinates.

As the Congressional Research Service reported,[91] President Clinton's refusal to support Taiwan independence does not mark a new direction in U.S. China policy. From the moment National Security Advisor Henry A. Kissinger and

---

[87] Sutter, *"Three No's," supra* note 82, at CRS-1 (footnote omitted) (referring to the Shanghai Communiqué (1972) and the Joint Communiqué of 1979)).

[88] President Lee Teng-hui, Responses to Questions Submitted by *Deutsche Welle* (Voice of Germany) (July 9, 1999) (visited August 17, 1999) <http://www.gio.gov.tw/info/99html/991ee/07009.htm> at 3-4.

[89] President's News Conference, 35 WEEKLY COMP. PRES. DOC. 1438, 1440 (July 21, 1999) (Pet. App. 96-99).

[90] Secretary of State Madeleine K. Albright, Press Conference, Four Seasons Hotel, Singapore (July 25, 1999) (visited July 26, 1999) <http://secretary.state.gov/www.statements/1999/990725.html> at 4 (Pet. App. 100).

[91] Sutter, *"Three No's," supra* note 82, at CRS-1.

President Richard M. Nixon worked out the Shanghai Communiqué in 1972, the U.S. has never officially supported Taiwan independence. In a study he prepared while a visiting scholar at the Woodrow Wilson International Center for Scholars, *Los Angeles Times* diplomatic correspondent James Mann explains that President Nixon gave Chou Enlai "several private assurances . . . that Taiwan was part of China, that the United States would not support the independence of Taiwan . . . and [would] move toward normalization with China."[92] In promulgating "the three noes" during their 1998 visits to China, Secretary Albright and President Clinton simply made explicit what had always secretly been true – that the U.S. does not support independence for Taiwan,[93] two Chinas, one China – one Taiwan, or Taiwan statehood.[94]

Even without this declaration of the "three noes," the court of appeals should have declined, under this Court's act-of-state doctrine,[95] to nullify China's accession to the Warsaw Convention for Taiwan. It should have enforced the Convention because the U.S. recognizes the PRC as China's sole legal government and acknowledges its claim to Taiwan.[96] In view of the "three noes," the amicus position is untenable. During oral argument, counsel for the United States could not reconcile the contradiction between the two positions. Counsel simply dismissed President Clinton's "three noes" and

---

[92] MANN, ABOUT FACE, *supra* note 64, at 46. For authority, Mann cites "Nixon's notes, 'First Private Meeting,' Feb. 22, 1972, Nixon papers, National Archives." MANN, ABOUT FACE, *supra* note 64, at 382 n.55.

[93] Reply Brief, *supra* note 53, at 4-6.

[94] Remarks in a Roundtable Discussion on Shaping China for the 21st Century, 34 WEEKLY COMP. PRES. PAPERS 1243, 1272 (June 30, 1998) (Pet. App. 94); *see also* Sutter, *"Three No's,"* *supra* note 82, at CRS-10.

[95] Banco Nacional de Cuba, 376 U.S. 398 at 416-18.

[96] Address to Nation, *supra* note 68, 1978 PUB. PAPERS: 2 JIMMY CARTER at 2264-66 (Pet. App. 83-84).

assured the court that the U.S. considers Taiwan independent of China.[97]

This Court does not often see cases in which Executive-branch subordinates manifestly err in stating the president's policy – but this is such a case. This discrepancy between the amicus position and President Clinton's policy probably stems from dissidence within the Department of State about what U.S. policy ought to be. Such differences are historically demonstrable, as Mann relates: "Within most administrations, intense infighting erupted among high-level officials and within executive-branch departments over how to deal with China."[98] Mann discloses that "the process of dealing with China was intensely personalized. Often, no more than one or two officials within an administration were entrusted to handle dealings with China. Sometimes, not even the secretary of state knew what was happening."[99] This sounds like a Tom Clancy novel, but it suggests how the amicus brief could have contradicted the secretary of state and the president.

Obviously, the concept of Taiwan independence has adherents within the Executive branch as well as Congress. But is that sentiment official U.S. policy? Does the power of diplomatic recognition rest with the Department of State's legal adviser and the assistant attorney general – who led the amicus brief – or is it reposed in the president? By favoring the amicus over the president, the court traversed the political-question doctrine and determined a foreign-policy question reserved to the president.[100] Mingtai asked the court to weigh the policy statements of President Clinton and

---

[97] Oral Argument Tape, *supra* note 53.

[98] MANN, ABOUT FACE, *supra* note 64, at 11.

[99] *Id.*

[100] U.S. CONST. art. II, § 3 (Pet. 2); United States v. Pink, 315 U.S. 203, 229-30; United States v. Curtiss-Wright, 299 U.S. at 320.

Secretary Albright.[101] Instead, the court dispraised Mingtai's case as "contrary to every indication of executive and legislative intent."[102]

But if the president is "the sole organ of the federal government in the field of foreign relations,"[103] his foreign-policy statements – not those of his subordinates – must receive judicial deference. True, it falls to lower employees in the Executive branch to express the government's view in court, and the courts usually defer to such expressions.[104] But when litigation turns on foreign policy matters, it can be problematic to rely on what the president's subordinates say. As one scholar warned a decade ago – on the Constitution's bicentennial: "Pragmatic concerns about the effective execution of U.S. foreign policy appear to demand that the executive branch of the Government be accorded a salient role when such matters are involved in litigation. These concerns have led courts to accord great respect to the executive branch's positions. This deference, however, may be unjustified in many cases."[105]

Deference is appropriate toward "actions taken by the United States in its international relations upon the instruction of the President and contemporaneously explained in statements personally made by the President to concerned foreign

---

[101] Reply Brief, *supra* note 53, at 4-6; Oral Argument Tape, *supra* note 53.

[102] Mingtai, 177 F.3d at 1147 (Pet. App. 9).

[103] United States v. Curtiss-Wright, 299 U.S. at 320.

[104] As this Court has noted, "Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty." El Al Israel Airlines, Ltd. v. Tsui Yuen Teng, 525 U.S. 155, ___, 119 S. Ct. 662, 671 (1999).

[105] Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 Am. J. Int'l L. 805, 806 (1989).

governments."[106] But deference is not due "unilateral statements by an executive branch employee prepared solely to influence the outcome of specific litigation."[107]

"The interests of uniformity and respect for the Executive's conduct of U.S. foreign relations are strongly supported if deference is given to an international action by the United States taken prior to and independently of domestic litigation."[108] President Clinton's public refusal to support Taiwan independence is such an action. "In contrast, internal statements, especially those made in the course of domestic litigation, do not constitute an exercise of the authority to conduct foreign affairs, nor do they necessarily give voice to the desired interests."[109] The amicus argument for treating Taiwan as an independent state was made in the course of domestic litigation, and was not entitled to uncritical acceptance. "Deference should be based only upon actions taken by the constitutional authority in the conduct of U.S. international affairs."[110]

4. The court's holding contradicts China's understanding of its agreements with the U.S.

This Court has emphasized the need, in matters of foreign relations, to speak with a single voice.[111] With the court of appeals contradicting the president's one-China policy, the U.S. has spoken now with two voices – and China has reacted.

In a note to the Department of State, written while the appeal was pending, China protested the amicus contention that the U.S. has not recognized in China a power to bind Taiwan to the Warsaw Convention:

---

[106] *Id.* at 812.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] Baker v. Carr, 369 U.S. at 211.

> This statement contradicts the principles enshrined in the 1979 Joint Communique on the Establishment of Diplomatic Relations between China and the United States, in which the United States government recognized the government of PRC as the sole legal government of China, and Taiwan as part of China. It also represents a breach of its own international commitments by the U.S. government. The Chinese government hereby firmly opposes such statement.[112]

China claimed that U.S. recognition of the PRC meant recognition that the PRC "represents the whole of China including Taiwan. Hence China's international commitments bind every part of China's territory."[113]

Besides contending that China's accession to the Warsaw Convention did not bind Taiwan, the amicus implied that the U.S. has never accorded that act any legal effect.[114] When notified of the accession, as the amicus explained, the Department of State replied: "Inasmuch as the Government of the United States of America recognizes the Government of the Republic of China as the only legal Government of China and does not recognize the so-called 'People's Republic of China,' it regards this action as being without legal effect."[115]

The court did not address the effect of such reasoning today. The logic that drove the U.S. to reject China's accession in 1959 would have compelled acceptance of it as soon as President Carter recognized the PRC as China's sole legal government.[116] China makes this point: "Even if the Convention failed to apply to China-U.S. relations, as the U.S. side argues, for lack of mutual diplomatic recognition before 1979, the establishment of diplomatic relations in 1979 should have

---

[112] Chinese Embassy Note, *supra* note 38, at 1 (Pet. App. 101).

[113] *Id.* (Pet. App. 102).

[114] Amicus Brief, *supra* note 36, at 9.

[115] Dep't of State File # 399.72/7-359, *supra* note 8 (Pet. App. 74).

[116] Reply Brief, *supra* note 53, at 2-3.

had a legal consequence of activating mutual application of all international treaties between them."[117] In *Belmont*, this Court held that the effect of President Roosevelt's recognition of the USSR "was to validate, so far as this country is concerned, all acts of the Soviet government here involved from the commencement of its existence."[118]

Whether the U.S. denies the retroactive legal effect of China's accession the court of appeals does not say. But there was no evidence that the U.S., in recognizing China, took exception to China's accession for Taiwan. Under international law, when a state ratifies or accedes to a treaty with a reservation, any state that takes exception to the reservation must make known its exception or be bound by the reservation.[119] Though the U.S. recognized China more than 20 years ago, it has never objected to China's declaration that its accession applies to "the entire Chinese territory including Taiwan."[120] Presumably, the U.S. did not object because President Nixon secretly agreed the U.S. would not support Taiwan independence.[121]

Finally, China's *note verbale* "urge[d] the U.S. side to seriously reconsider its brief to the U.S. court which contains languages [*sic*] incompatible with its commitment to the 'One China Policy' and its legal obligations under international law, and take practical steps to fully respect China's

---

[117] Chinese Embassy Note, *supra* note 38, at 2 (Pet. App. 102).

[118] United States v. Belmont, 301 U.S. at 330.

[119] Vienna Convention on the Law of Treaties, art. 21(3), U.N. Doc. A/CONF. 39/27 (1969), *reprinted in* 63 AM. J. INT'L L. 875 (1969). The U.S. has not ratified the Vienna Convention but regards it as stating the substantive international law of treaties. RESTATEMENT, *supra* note 63, pt. III, introd. note.

[120] 2 SHAWCROSS & BEAUMONT, *supra* note 5, at A 17, A 23 n.8.

[121] MANN, ABOUT FACE, *supra* note 64, at 46-49.

sovereignty and territorial integrity."[122] But the amicus maintained its position through oral argument of the appeal.[123]

The Shanghai Communiqué, agreed to by President Nixon in 1972, declared that the U.S. and China would respect each other's sovereignty and territorial integrity:

> [T]he two sides agreed that countries, regardless of their social systems, should conduct their relations on the principles of respect for the sovereignty and territorial integrity of all states, non-aggression against other states, non-interference in the internal affairs of other states, equality of mutual benefit, and peaceful coexistence. . . . The United States and the People's Republic of China are prepared to apply these principles to their mutual relations.[124]

In the Shanghai Communiqué, the U.S. also agreed not to challenge the claim that Taiwan is part of China: "The United States acknowledges that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is part of China. The United States Government does not challenge that position."[125] In 1979, President Carter reaffirmed this in the Joint Communiqué.[126]

These commitments appear to justify an expectation that the U.S. would never take the position it urged in the court of appeals – that Taiwan is not part of China. According to one scholar who focuses on cross-Strait relations:

> To argue in 1999 that the Warsaw Convention does not apply to Taiwan – as the U.S. appears to do – is to challenge a position that in 1972 the U.S. said it

---

[122] Chinese Embassy Note, *supra* note 38, at 2 (Pet. App. 102).

[123] Oral Argument Tape, *supra* note 53.

[124] Shanghai Communiqué, *supra* note 74, at 2 (Pet. App. 79-80).

[125] *Id.* at 3 (Pet. App. 81).

[126] Joint Communiqué, *supra* note 9, 1978 PUB. PAPERS: 2 JIMMY CARTER at 2264 (Pet. App. 83-84).

does not challenge. It is an argument that undermines the territorial integrity of the Chinese state, which the U.S. also pledged to respect.[127]

5. The court's decision deprives Taiwan of the benefits of the Warsaw Convention's international air regime.

The amicus hastened to protect Taiwan from the prospect of another decision – like the one in *Atlantic Mutual*[128] – that Taiwan is within the territory of China for purposes of the Warsaw Convention. But the amicus failed to consider whether it would serve Taiwan's interest to strip it – and the foreigners who trade and visit there – of the Convention's predictability and uniformity. This Court has explained the Convention's purpose of bringing uniformity to international air law.[129]

In fact, news of the court of appeals' decision created a furor in Taiwan, where the business community views the result as inimical to Taiwan's economic health. The ruling deprives the Taiwanese – and their American visitors and customers – of the most comprehensive international air regime. Taiwan's principal air carriers – China Airlines and EVA Airways – have routinely invoked the Convention when sued in U.S. courts.[130] This decision deprives them of the

---

[127] Letter from Alan Wachman to petitioner's counsel of record, Aug. 10, 1999 (citing the Amicus Brief in this case). Professor Wachman teaches at the Fletcher School of Law and Diplomacy.

[128] Atlantic Mutual, 796 F. Supp. at 1191.

[129] El Al Israel Airlines, 525 U.S. at ___, 119 S. Ct. at 671-72.

[130] *See, e.g.*, China Airlines, Inc.'s motion for summary judgment, at 7:14-8:2 (asserting limitation of liability under Warsaw Convention), filed in First Ins. Co. v. China Airlines, Inc., No. CV-97-3731 JSL (RNBx) (C.D. Cal. 1997), Docket No. 98-15088 (9th Cir.), Excerpts of Record 54:14-55:2); General Denial of EVA Airways Corp. & Affirmative Defenses, ¶ 8, at 4-5, (asserting defenses under Warsaw Convention), filed Dec. 28, 1998, in Eagle Star President General Ins. Co. v. EVA Airways

commercial certainty and defenses afforded by the Convention. It ensures that U.S. courts will no longer apply the Warsaw Convention – or any amending treaty to which China may adhere – when deciding claims for cargo loss or damage or passenger death or injury arising during air transportation to and from Taiwan. The decision will have this effect because statehood is a prerequisite to membership in ICAO,[131] and only states may accede to the Convention.[132]

The formally-recognized Chinese government and the "people on Taiwan" with whom Americans have unofficial relations are united in opposing this result. The only interests served by the decision are those of a solitary all-cargo airline – UPS – that is unwilling to abide by the international limitation of liability set forth in the Convention. Everyone else – here and in China – loses by this decision.

The court's decree caused grave concern on Taiwan, where the Ministry of Foreign Affairs, on June 17, 1999, met with manufacturers, insurers, airlines, legal advisers, and academics to assess the commercial consequences of this decision. The meeting produced a consensus that Mingtai should ask this Court to review – and reverse – the judgment below.[133] Whatever good for Taiwan the proponents of two Chinas may have hoped, the result the amicus achieved is not pro- but anti-Taiwanese – and anti-Chinese.

Corp., Case No. 98K2258 (Municipal Court of the State of California, County of Los Angeles, Los Angeles District).

[131] Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 ("Chicago Convention"), art. 93 bis. *See* discussion of ICAO in text accompanying note 23 *supra*.

[132] 1 SHAWCROSS & BEAUMONT, *supra* note 23, § II(15)

[133] An early review by Georgetown Law Professor John R. Schmertz, Jr., also questions the decision: "The U.S. recognition of China (and the de-recognition of Taiwan) would arguably require the court to honor China's declaration." 5 INT'L L. UPDATE 62 (June 1999).

6. Summary of reasons for granting the petition.

a. Constitutional and legal reasons:

- The holding that the Taiwan Relations Act treats Taiwan as a foreign state contravenes the president's withdrawal of recognition from the ROC and his decision not to support Taiwan independence. The holding thus infringes the constitutional separation of powers.

- The holding that China's accession to the Warsaw Convention does not bind Taiwan contradicts the president's recognition of the PRC as China's sole legal government and his commitment not to challenge the Chinese position that Taiwan is part of China. This violates the political-question doctrine.

- The holding that China's accession does not bind Taiwan violates this Court's act-of-state doctrine, which prohibits judicial review of the act of a foreign sovereign within its own territory.

- The court's conclusion that the Warsaw Convention cannot apply to Taiwan unless the PRC has the power to bind Taiwan is incorrect. By its own terms, the Convention applies to flights to or from Taiwan because Taiwan is within the territory of China – a point on which China and the ROC agree.

b. Pragmatic reasons:

- China has formally protested the amicus position, claiming it violates the Shanghai Communiqué and China's rights as a sovereign.

- Taiwanese commercial interests oppose the decision because it deprives exporters, importers, airlines, passengers, and insurers of the legal uniformity and commercial certainty provided by the Warsaw Convention.

- The ROC's Ministry of Foreign Affairs has encouraged Mingtai to file this petition because it deems the decision deleterious to Taiwan's economic vitality. The Ministry

does not consider the case to present a "political" issue because the ROC does not dispute that Taiwan is part of China.

- Reversal of the court of appeals' decision is the only practical way to restore Taiwanese access to the Warsaw Convention. So long as the UN maintains that the PRC is the sole legitimate government of China, the ROC cannot accede to the Convention or any other treaty for which statehood is a requirement.

- The Chinese people should be left to work out their own destiny. Since China and Taiwanese interests alike call for the Warsaw Convention's application to Taiwan-U.S. air transportation, the federal judiciary should not impose a contrary result simply to benefit a private U.S. company.

For these constitutional, legal, and pragmatic reasons, Mingtai respectfully asks this Court to grant this petition and issue a writ of certiorari to the Ninth Circuit Court of Appeals.

Dated: August 23, 1999.

Respectfully submitted,

Michael W. Lodwick
of Porter, Groff & Lodwick
Counsel of Record for Petitioner